DEPARTMENT OF EMPLOYMENT SERVICES

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Employment Services, pursuant to the authority set forth in sections 11 and 14 of the Accrued Sick and Safe Leave Act of 2008, effective May 13, 2008 (D.C. Law 17-152; D.C. Official Code §§ 32-131.10 and 131.13 (2008 Supp.)) ("Act") , and Mayor's Order 2008-153, dated November 6, 2008, hereby gives notice of intent to adopt a new Chapter 32 entitled "Accrued Safe and Sick Leave" to Title 7 (Employment Benefits) of the District of Columbia Municipal Regulations ("DCMR").

The rulemaking implements the provisions of the Act, which requires employers in the District of Columbia to provide paid leave to employees for illness and for absences associated with domestic violence and sexual abuse.

A Notice of Proposed Rulemaking was initially published in the *D.C. Register* on December 19, 2008, at 55 DCR 12707. Substantial public comment was received pertaining to the proposed rules. In addition, the Act was subsequently amended by §311 of the Technical Amendments Act of 2008, effective March 25, 2009 (D.C. Law 17-353; D.C. Official Code §§ 32-131.02(c) and 32-131.09 (c)) (2009 Supp.). The proposed rulemaking published with this notice supersedes the Notice of Proposed Rulemaking published on December 19, 2008.

Final rulemaking action to adopt these rules shall be taken not less than thirty (30) days after the publication of this Notice in the D.C. Register and approval of the proposed rules by the Council of the District of Columbia pursuant to section 14 of the Act (D.C. Official Code § 32-131.13).

Title 7 (Employment Benefits) of the DCMR is amended by adding a new Chapter 32 to read as follows:

CHAPTER 32 ACCRUED SAFE AND SICK LEAVE

3200 PURPOSE AND SCOPE

3200.1 The purpose of this Chapter is to establish standards and procedures for the implementation of the Act.

3200.2 Unless otherwise required by law, all matters concerning the implementation and enforcement of the Act shall be determined in accordance with these regulations.

3201 **PROVISION OF PAID LEAVE; AMOUNT OF PAID LEAVE**

3201.1 An employee shall begin to accrue paid leave pursuant to the Act and this Chapter on the date the individual qualifies as an employee provided, that accrual shall not commence before November 13, 2008.

3201.2 An employer employing one hundred (100) or more employees in the District of Columbia shall provide each employee not less than one (1) hour of paid leave for each thirty-seven (37) hours worked, not to exceed seven (7) days of paid leave per calendar year.

3201.3 An employer employing from twenty-five (25) to ninety-nine (99) employees in the District of Columbia shall provide each employee with not less than one (1) hour paid leave for every forty-three (43) hours worked, not to exceed five (5) days of paid leave per calendar year.

3201.4 An employer employing twenty-four (24) or fewer employees in the District of Columbia shall provide not less than one (1) hour of paid leave for every eighty-seven (87) hours worked, not to exceed three (3) days of paid leave per calendar year.

3201.5 For purposes of subsections 3201.2- 3201.4, the number of employees employed by an employer shall be average number of monthly full-time equivalent employees it employed in a preceding calendar year. This number shall be computed by adding the total number of full-time equivalent employees employed in the District of Columbia at the beginning of each month of the preceding calendar year and dividing by 12.

3201.6 The employment location of an employee shall be determined in accordance with the definition of the term “employee”.

3202 **EXCEPTIONS TO CALCULATION OR PROVISION OF PAID LEAVE**

3202.1 An employee who is exempt from overtime payment by reason of section 213(a)(1) of the Fair Labor Standards Act of 1938, approved June 25, 1938 (52 Stat. 1060; 29 U.S.C. § 201 *et seq.*) shall not accrue leave pursuant to this chapter for hours worked beyond a forty (40) hour work week.

3202.2 An individual who works for an employer both as an employee and in a non-covered employment position shall accrue paid leave for the hours worked as an employee.

3202.3 If an employee does not suffer a loss of income when absent from work for the number of days of paid leave required pursuant to § 3201, the employer shall not be required to provide paid leave to the employee.

3203 **USES OF PAID LEAVE**

3203.1 An employee may use paid leave for the following reasons:

(a) An absence resulting from a physical or mental illness, injury, or medical condition of the employee;

(b) An absence resulting from obtaining professional medical diagnosis or care or preventive medical care for the employee; or

(c) An absence for the purpose of caring for a family member who has any of the conditions or needs for diagnosis or care described in paragraphs (a) and (b) of this subsection.

3203.2 An employee may also use paid leave for an absence if the employee or the employee's family member is a victim of stalking, domestic violence, or sexual abuse and the absence is directly related to medical, social, or legal services pertaining to the stalking, domestic violence, or sexual abuse for the purposes of:

(a) Seeking medical attention for the employee or the employee's family member to treat or recover from physical or psychological injury or disability caused by the stalking, domestic violence, or sexual abuse;

(b) Obtaining services for the employee or the employee's family member from a victim services organization;

(c) Obtaining psychological or other counseling services for the employee or the employee's family member;

(d) The temporary or permanent relocation of the employee or the employee's family member;

(e) Taking legal action, including preparing for or participating in any criminal or civil proceeding related to or resulting from the stalking, domestic violence, or sexual abuse; or

(f) Taking other actions that could be reasonably determined to enhance the physical, psychological, or economic health or safety of the employee or the employee's family member or the safety of those who work or associate with the employee.

3204 ACCESSING PAID LEAVE

3204.1 Only an employee may access paid leave.

3204.2 Unused paid leave accrued by an employee during a twelve (12) month period shall carry over annually. An employee shall not use in one (1) 12-month period more than the maximum hours accrued pursuant to subsections § 3201.2, § 3201.3, and § 3201.4 of this Chapter unless the employer permits otherwise.

3204.3 Paid leave accrued pursuant to the Act which is unused at the termination or resignation of the employee shall not be reimbursed to the employee

3205 LIMITATIONS ON USE OF PAID LEAVE

3205.1 An employee shall not use in any calendar year more paid leave accrued pursuant to the Act than the maximum number of hours that the employee may accrue annually pursuant to §3201 unless permitted to do so by the employer.

3205.2 If mutually agreed to by both the employer and employee, an employee[i] who chooses to work additional hours or shifts in the employer's same or next pay period in lieu of hours or shifts missed shall not use leave accrued pursuant to the Act in those hours or shifts; provided, however, that the employer does not require the employee to work such additional hours or shifts.

3206 REQUIRED NOTICE TO EMPLOYERS

3206.1 An employee shall provide at least ten (10) days prior written notice to his or her employer of the employee's planned use of paid leave, if the employee is aware of the need to use such paid leave at least ten (10) days before the date on which the paid leave is to be used.

3206.2 If an employee becomes aware of the need to use paid leave less than ten (10) days before the date on which the paid leave is to be used, the employee shall provide written notice to the employer of the need to use the paid leave on the day that the employee becomes aware of the need to use the paid leave or, otherwise as early as possible. If that day is not a business day for the employer, notice shall be given on the next business day.

3206.3 If the need to use paid leave is not foreseeable, the employee shall make an oral request for paid leave prior to the start of the work shift for which the paid leave is requested.

3206.4 If an emergency prevents the employee from making prior notification to the employer of the need to use paid leave, the employee shall notify the employer before the start of the employee's next work shift or within twenty-four (24) hours after the onset of the emergency, whichever occurs sooner.

3206.5 An employee shall make a reasonable effort to schedule paid leave in a manner that does not unduly disrupt the operations of the employer. If paid leave is requested in a non-emergency situation, the employee shall consult with the employer regarding the date and time of the paid leave to be taken.

3207 FORM OF NOTICE TO EMPLOYERS

3207.1 The employer may prescribe a written notice form for the request of paid leave. Such form shall require only the employee's name, employee identification number (if any), and minimal information needed (e.g., type of leave, or basic reason for leave) to show that the request comes within the Act's coverage, and the date(s) and time of the paid leave to be taken.

3207.2 The leave request form shall not be used as a substitute for medical certification, unless such use is designated by the employer.

3207.3 If the employer prescribes a form, but the form is not reasonably available to the employee, the employee may provide written notice to the employer by setting forth in writing the information required by §3207.1.

3207.4 If the employer has not prescribed a form, the employee may provide written notice to the employer by setting forth in writing the information required by § 3207.1.

3208 CERTIFICATION OF LEAVE REQUEST

3208.1 An employer may require that a request for the granting of paid leave for three (3) or more consecutive days be supported by a reasonable certification of the reason given by the employee for requesting the paid leave.

3208.2 A reasonable certification may include:

(a) A signed document from a health care provider affirming the illness of the employee or the employee's family member;

(b) A police report indicating that the employee or the employee's family member was the victim of stalking, domestic violence, or sexual abuse;

(c) A court order indicating that the employee or employee's family member was the victim of stalking, domestic violence, or sexual abuse;

(d) A signed written statement from a victim and witness advocate affirming that the employee or employee's family member is involved

in legal action or proceedings related to stalking, domestic violence, or sexual abuse. The signed statement shall include only the name of the employee or employee's family member who is a victim and the date on which services were sought; or

(e) A signed written statement from a victim and witness advocate or domestic violence counselor affirming the employee or employee's family member sought services to enhance the physical, psychological, economic health, or safety of the employee or employee's family member.

3208.3 If the employer requires a certification, the certification shall be provided upon the employee's return to work or within one business day thereafter.

3209 RELEASE OF INFORMATION

3209.1 Nothing in the Act or this chapter shall require a health care professional to disclose information in violation of section 1177 of the Social Security Act, effective August 21, 1996 (110 Stat. 2029; 42 U.S.C. § 1320d-6) or the regulations promulgated pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996, effective August 21, 1996 (110 Stat. 2033; 42 U.S.C §1320d-2 note).

3209.2 Information provided to an employer pursuant to §§ 3206, 3207, or 3208 shall not be disclosed by the employer, except when such disclosure is:

(a) Requested or consented to by the employee;

(b) Ordered by a court or administrative agency; or

(c) Otherwise required by federal or local law.

3210 CARRYOVER OF PAID LEAVE

3210.1 Unused paid leave accrued in one calendar year shall be carried over to the next calendar year.

3210.2 An employee shall not use more paid leave in one (1) year than the employee accrues pursuant to § 3102.2 through 3102.4 of this Chapter, unless permitted by the employer.

3211 PAYOUT OF PAID LEAVE

Accumulated paid leave shall not be reimbursed upon the discharge or resignation of an employee.

3212 EFFECT ON CURRENT COMPENSATED LEAVE POLICIES

3212.1 An employer that has a paid leave policy (for example, paid time off or universal leave) that allows the employee to utilize paid leave at the employee's discretion and that allows the accrual and use of paid leave under terms and conditions that are at least equivalent to the paid leave prescribed in the Act, shall not be required to modify that policy

3212.2 An existing compensated leave policy shall be presumed to be equivalent to requirements of the Act if the policy allows the employee to:

(a) Access and accrue compensated leave at the same rate or greater than the hours of leave provided in § 3201 of this Chapter; or

(b) Use the compensated leave for the same purposes as those set forth in § 3203.

3213 POSTING REQUIREMENTS AND PENALTIES

3213.1 The employer shall post and maintain in a conspicuous place a notice, prescribed and provided by the Mayor, which sets forth excerpts and summaries of the Act and contains information pertaining to the filing of complaints asserting violations of the Act.

3213.2 The employer shall post the notice in English and in all languages spoken by its eligible employees with limited or no-English proficiency as defined in section 2(5) of the of the Language Access Act, effective June 19, 2004 (D.C. Law 15-167; D.C. Official Code § 2-1931(5)).

3213.3 An employer who willfully fails to post a notice pursuant to this section shall be assessed a civil penalty of one hundred dollars ($100) per day for each day that the employer fails to post the notice; provided, that the total penalty shall not exceed five hundred dollars ($500) per violation.

3213.4 An employer shall not be liable for failing to post a notice until thirty (30) days after the Mayor provides the notice required by section 10 of the Act to the employer.

3214 EFFECT ON EXISTING EMPLOYMENT BENEFITS

3214.1 The provisions of the Act do not alter the obligation of an employer to comply with any collective bargaining agreement or any employment benefit or plan that provides paid leave rights greater than those established by the Act.

3214.2 Subject to the provisions of section 7 of the Act (D.C. Official Code § 32-131.06) and § 3216 of this Chapter, a written bona fide collective bargaining

agreement shall not waive the paid leave requirements of the Act and this Chapter, unless such collective bargaining agreement provides at least three (3) paid days of leave.

3215 PROHIBITED ACTS

3215.1 No employer or person acting on behalf of an employer shall interfere with, restrain, or otherwise deny the exercise or attempt to exercise of any right provided by the Act.

3215.2 An employer shall not discharge or discriminate in any manner against an employee because the employee:

(a) Opposes any practice by an employer made unlawful by the Act;

(b) Files or attempts to file a claim or charge for violation of the Act;

(c) Institutes or attempts to institute an proceeding under the Act;

(d) Facilitates the institution of a proceeding under the Act;

(e) Provides information or testimony in connection with an inquiry or proceeding related to the Act; or

(f) Uses paid leave in accordance with the Act and this Chapter.

3215.3 The Act shall not be construed to prohibit an employer from creating and enforcing a policy that prohibits the improper use of paid leave or that requires the more frequent certifications from an employee if there is evidence documenting a pattern of abuse of paid leave. A pattern of abuse may be evidenced by the following:

(a) Consistent taking of paid leave without the notice required by the Act;

(b) Consistent taking of leave on days for which vacation or annual leave have been denied;

(c) A pattern of taking paid leave on days where the employee is scheduled to work a shift or perform duties perceived as undesirable, including high customer volume days; or

(d) A pattern of taking paid leave on Mondays, Fridays, or the day immediately preceding or following holidays.

3216 COMPLAINT RESOLUTION

3216.1 A person who believes that he or she has been improperly denied a right created by the Act may file a complaint with the Department of Employment Services in the form and manner prescribed by the Director of the Department. Complaints shall be filed within sixty (60) days after the event on which the complaint is based; provided that no sixty (60) day period shall commence until the employer has posted the notice required by section 10 of the Act and § 3213 of this Chapter.

3216.2 The Director shall review all complaints and shall investigate those complaints which the Director determines require investigation.

3216.3 A complaint shall be investigated and resolved in an expeditious manner consistent with the nature of the complaint. The Director shall make all reasonable efforts to resolve the complaint within forty-five (45) business days after the filing of the complaint.

3216.4 In the course of investigating, resolving, and deciding complaints, the Director shall have the authority to:

(a) Investigate and ascertain the length of service, hiring dates, paid leave usage requests, certifications provided by employees, and any other issue relating to the rights created by the Act;

(b) Require sworn written statements from employers and employees concerning the issues raised by the complaint; and

(c) Conduct informal investigations, examinations, or meetings at which employers and employees appear, give sworn statements, and answer questions from the Director or the adverse party.

3216.5 Following an investigation, the Director shall issue a decision concerning the complaint. Copies of the decision shall be served on each party at their last known address.

3216.6 A party aggrieved by the Director's decision may appeal the decision as provided in the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*).

3216.7 Complaints shall be investigated and resolved in an expeditious manner consistent with the nature of the complaint.

3216.8 The employer shall maintain records of the accrual, granting, and denial of paid leave pursuant to the Act for a period of three (3) years as generally provided in 7 DCMR § 911.

3217 PENALTIES

3217.1 Except as provided in § 3213.3, an employer who willfully violates the requirements of the Act shall be assessed a civil penalty in the amount of five hundred dollars ($500) for the first violation, seven hundred and fifty dollars ($750) for the second violation, and one thousand dollars ($1,000) for the third and any subsequent violations.

3217.2 All penalties paid by employers shall be deposited into the General Revenue Fund of the District of Columbia.

3299 DEFINITIONS

When used in this Chapter, the term:

Act – means the Accrued Safe and Sick Leave Act of 2008, effective May 13, 2008 (D.C. Law 17-152; D.C. Official Code § 32-131.01 *et seq.*).

Day – means the length of the employee's customary work day or work shift.

Director – means the Director of the District of Columbia Department of Employment Services, or the Director's designee.

Discharge –means the involuntary severing of the employment relationship by the employer.

Domestic violence – means an intra-family offense as defined in D.C. Official Code § 16-1001(8).

Emergency – means an unexpected or unforeseen event or events which render an employee unable to contact the employer or communicate the need to access leave accrued under the Act within the time periods established by §§ 3206.1, 3206.2, and 3206.3.

Employee – means an individual who has been employed by the same employer for at least one (1) year without a break in service except for regular holiday, sick, or personal leave granted by the employer and who has worked at least one thousand (1,000) hours of service with such employer during the previous 12-month period. The term "employee" also includes an individual who meets the foregoing criteria and who is employed by the employer in more than one location and spends more than fifty percent (50%) of his or her working time for his or her employer in the District of Columbia or whose employment is based in the District of Columbia and who regularly spends a substantial part of his or her time working for the employer in the District of Columbia and does not spend more than fifty percent (50%) of his or her work-time working for the employer in any particular state. The term "employee" shall not include: (1) an independent

contractor, (2) a student, (3) health care workers who choose to participate in a premium pay program, or (4) restaurant wait staff and bartenders who work for a combination of wages and tips.

Employer – means (including a for-profit or not-for-profit firm, partnership, proprietorship, sole proprietorship, limited liability company, association or corporation), or any receiver or trustee of such entity (including the legal representative of a deceased individual or receiver or trustee of an individual), who employs an employee. The term "employer" includes the District of Columbia government.

Non-covered employment position — means (1) an independent contractor, (2) a student, (3) a health care worker who choose to participate in a premium pay program, or (4) restaurant wait staff and bartenders who work for a combination of wages and tips.

Family member — means:

(1) A spouse, including the person identified by an employee as his or her domestic partner, as defined in section 2(3) of the Health Care Benefits Expansion Act of 1992, effective June 11, 1992 (D.C. Law 9-114; D.C. Official Code § 32-701(3));

(2) The parents of a spouse;

(3) Children (including step-children, foster children, and grandchildren);

(4) The spouses of children (including step-children, foster children, and grandchildren);

(5) Parents (including step-parents);

(6) Brothers and sisters (including step-brothers and sisters and half-brothers and sisters);

(7) The spouses of brothers and sisters (including step-brothers and sisters and half-brothers and sisters);

(8) A child who lives with the employee and for whom the employee permanently assumes and discharges parental responsibility; and

(9) A person with whom the employee shares or has shared, for not less than the preceding of twelve (12) months a mutual residence and with whom the employee maintains a committed relationship, as defined in section 2(1) of the Health Care Benefits Expansion Act of 1992, effective June 11, 1992 (D.C. Law 9-114; D.C. Official Code §32-701(1)).

Paid leave – means accrued hours of paid leave provided by an employer for use by an employee in hourly increments during an absence from work for any of the reasons specified in section 3(b) of the Act, for which the employee is paid at the same rate as if the employee were working.

Premium pay program – means a plan offered by an employer by which an employee may voluntarily elect to receive additional pay in lieu of benefits.

Restaurant wait staff and bartenders – means waiters, waitresses, counter personnel who serve customers, bus persons, server helpers, service bartenders, and barbacks.

Sexual abuse – means an offense described in the Anti-Sexual Abuse Act of 1994, effective May 23, 1995 (D.C. Law 10-257; D.C. Official Code § 22-3001 *et seq.*).

Student – means a person employed by an employer who:

(1) (A) Is a full-time student as defined by an accredited institution of higher education;

(B) Is employed by the institution at which the student is enrolled;

(C) Is employed for less than 25 hours per week (the number of hours being determined based on the standard or usual work week of the employee); and,

(D) Does not replace an employee covered by the Act; or

(2) Is employed as part of the Year Round Program for Youth as established by the Department of Employment Services.

All persons wishing to comment on these proposed rules shall submit written comments no later than thirty (30) days after the publication of this notice in the *D.C. Register* to Eugene Irvin, General Counsel, Department of Employment Services, 64 New York Avenue, N.E., 3rd Floor, Washington, D.C. 20002. Copies of the proposed ruled may be obtained from the same address between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, excluding holidays.

DEPARTMENT OF EMPLOYMENT SERVICES

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Employment Services, pursuant to the authority set forth in Sections 11, 14, and 15 of the Accrued Sick and Safe Leave Act of 2008 (Act), effective May 13, 2008 (D.C. Law 17-0152; D.C. Official Code §§32-131.01-16 (2008)) and Mayor's Order 2008-153, dated November 6, 2008, hereby gives notice of the intent to adopt a new section 3218 within a new Chapter 32 entitled "Accrued Safe and Sick Leave" to Title 7 of the District of Columbia Municipal Regulations (DCMR) (Employment Benefits). (The Notice of Proposed Rulemaking for the remainder of the new Chapter 32 is being published separately.) The rulemaking implements section 15 of the Act to establish the criteria for the granting of a hardship exemption from the operation of the Act. The purpose of the Act is to require employers in the District of Columbia to provide paid leave for illness and for absences associated with domestic violence and sexual abuse.

A Notice of Proposed Rulemaking on the same subject matter was initially published in the *D.C. Register* on December 19, 2008, at 55 DCR 12707. This Notice of Proposed Rulemaking, along with the separately published Notice of Proposed Rulemaking for the remainder of the new Chapter 32, supersede the Notice of Proposed Rulemaking published on December 19, 2008.

The Director hereby gives notice of intent to take final rulemaking action to adopt these rules not less than thirty (30) days after the publication of this notice in the *D.C. Register* and the approval of the proposed rules by the Council of the District of Columbia as required by Section 15 of the Act (D.C. Official Code §32-131-14).

A new section 3218, of Chapter 32, of Title 7 ("Employment Benefits") DCMR, "Accrued Sick and Safe Leave", is added to read as follows:

3218 HARDSHIP EXEMPTION

3218.1 An employer may apply to the Associate Director of the Office of Labor Standards of the Department of Employment Services for an exemption from the provisions of the Act, pursuant to section 15 of the Act (D.C. Official Code § 32-131.14.

3218.2 The application shall be in writing and shall include a narrative fully explaining the basis for the request and shall be accompanied by supporting documentation sufficient to demonstrate that hardship has been or will be created by complying with the Act.

3218.3 Hardship means a negative impact caused or to be caused by the Act that:

(a) Threatens to significantly harm the financial viability of the employer for a period of not less than one (1) year;

(b) Jeopardizes the ability of the employer to sustain operations;

(c) Significantly degrades the quality of the employer's operations; or

(d) Creates a significant financial downturn in the revenues or income of the employer.

3218.4 After receipt of an application, the Associate Director may request additional information from the employer and designate a date by which such information shall be provided

3218.5 If the employer establishes that the Act has caused or will cause hardship, the Associate Director shall approve the application, exempt the employer from application of the Act, and establish the time period during which the exemption shall apply.

3218.6 The time period during which the exemption applies shall be consistent with the time period during which the hardship is likely to exist; provided, if the time period is greater than one (1) year, the employer may be required to reapply for the exemption after the expiration of one (1) year.

3218.7 The Associate Director shall issue a written decision within twenty-one (21) days after receiving a complete application, including any additional information requested pursuant to §3218.4. The written decision shall fully explain the reasons for approving or rejecting the application and for establishing the specific time period during which the exemption shall apply.

3218.8 The employer may appeal the decision of the Associate Director to the Director within ten (10) days after issuance of the decision. An appeal shall be in writing and shall provide a clear explanation of the basis for the appeal.

3218.9 The Director shall issue a decision on the appeal within thirty (30) days after receiving the appeal.

3218.10 During the pendency of an appeal the employer shall not be relieved from compliance with the Act or this chapter. Compliance shall be required until a hardship exemption is granted.

All persons wishing to comment on this proposed rule shall submit written comments no later than thirty (30) days after the publication of this notice in the *D.C. Register* to Eugene E. Irvin, General Counsel, Department of Employment Services, 64 New York Avenue, N.E., 3rd Floor, Washington, D.C. 20002. Copies of the proposed rules may be obtained from the same address between the hours of 9 a.m. and 5 p.m. Monday through Friday, excluding holidays.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF PROPOSED RULEMAKING

Regulations on Retail Establishment Carryout Bags

The Director of the District Department of the Environment ("DDOE"), in accordance with the authority set forth in section 107(4) of the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code §§ 8-151.01 *et seq*.), section 5(a) of the Anacostia River Clean Up and Protection Act of 2009 (the "Act"), effective September 23, 2009 (D.C. Law 18-55; D.C. Official Code § 2-1226.51 *et seq*.), Mayor's Order 2006-61, dated June 14, 2006, and Mayor's Order 2010-27, dated February 1, 2010, hereby gives notice of the intent to adopt the proposed rulemaking to add a new Chapter 10, entitled Retail Establishment Carryout Bags, to Title 21 of the District of Columbia Municipal Regulations (DCMR).

This proposed new chapter implements the provisions of the Act, which mandate that retail establishments charge a fee of five cents ($0.05) for each disposable carryout bag provided to a customer, mandate the material and labeling requirements of disposable carryout bags, authorize the retail establish to retain a portion of the fee charged for each bag, and allow the retail establishment to provide credit to customers who provide their own carryout bags to package their purchases.

The proposed regulations explain how DDOE will implement and enforce the requirements of the Act. While the proposed regulations closely track the language of the Act, certain provisions of the Act required further explication, and the regulations set forth how DDOE intends to implement and enforce the Act. These proposed regulations do not set forth the procedures through which the Office of Tax and Revenue, or the Department of Motor Vehicles will implement and enforce requirements of the Act that are within their jurisdictions.

For example, in Section 1001, DDOE sets forth the conditions under which the carryout bag fee must be charged. DDOE received numerous inquiries as to whether the Act required that the fee be charged for the purchase of food, if the food order is placed over the telephone or through the internet. Although the Act's definition of "disposable carryout bag" references the provision of the bag at the "point of sale" (see the lead-in text of Section 2(1) of the Act), the Act's fee provision states that the obligation to pay the fee arises "at the time of purchase" (see Section (4)(a)(1) of the Act). Section 1001 also sets forth DDOE's interpretation that the fee is associated with the purchase, whether or not the time of purchase coincides with the time that the bag and food are provided to the customer. Therefore, the regulation requires that the fee be charged for orders placed by telephone, over the internet, and by facsimile, as well as in-person orders.

Section 1003 of the proposed regulations identifies the retail establishments to which the requirements of the Act apply. This section sets forth DDOE's understanding that any retail establishment that is required to obtain a Public Health: Food Establishment Retail endorsement to their basic business license under Chapter 28 of Title 47 of the D.C. Official Code is subject to

the requirements of the Act. Accordingly, DDOE interprets the Act as meaning that businesses such as department stores and office supply stores, whose primary purpose is the sale of merchandise other than food, are nevertheless subject to the Act's requirements, if they also sell food items for which they are required to obtain a Public Health: Food Establishment Retail endorsement. In addition, Section 3(b) of the Act permits plastic and paper disposable carryout bags meeting certain criteria to be sold in the District. Section 1002 of the regulations makes clear that biodegradable and compostable bags are subject to these criteria.

Section 1006 of the proposed regulations identifies specific carryout bags that are not subject to the provisions of the Act. This section includes DDOE's interpretation of Section 2(1)(D) of the Act, which exempts "[p]aper carryout bags that restaurants… provide to customers to take food away from the retail establishment" from the Act. The proposed regulations therefore exempt from the application of the regulations paper carryout bags provided to customers to take food away from restaurants with seating, including both paper bags provided to the customer at purchase, such as carryout bags from fast-food restaurants, and bags provided to a customer to carry out a remaining portion of a meal that was otherwise consumed at the restaurant, commonly referred to as "doggy bags". In addition, the proposed regulations allow for the inclusion of incidental non-food items to be included in the bag (such as utensils or napkins, or small toys, for which there is no separate charge), without subjecting the provision of the bag to the requirements of the Act or the regulations. By contrast, the proposed regulations state that a paper bag provided by such a restaurant to a customer to carry out a non-food item (such as a compact disc or book) is subject to the requirements of the Act, and the regulations.

DDOE sets forth in Section 1008 of the proposed regulations an element of its interpretation of Section 4(b)(1)(B)(i) of the Act, which requires retail establishments that participate in the Carryout Bag Credit Program, to give a five cent ($0.05) credit "for each carryout bag provided by the consumer for packaging their purchases, regardless of whether that bag is paper, plastic, or reusable." The regulations set forth that a retail establishment participating in the Carryout Bag Credit Program is not required to provide a credit to customers who decline a bag for packaging their purchases.

Section 1011 of the proposed regulations sets forth DDOE's interpretation that Section 3(a) of the Act (which provides that "[d]isposable carryout bags made of plastic that cannot be recycled shall not be sold or distributed, retail or wholesale, in the District") bans the sale in the District of non-recyclable plastic bags when sold by a retail establishment or sold to a retail establishment.

Lastly, in addition to receiving specific comments on the proposed regulations, DDOE is inviting comments on the possible creation of a hardship exemption for certain types of retail establishments. The comments should include the rationale for why a particular type of retail establishment should receive an exemption, the objective criteria that should be used to qualify for the exemption, a list of specific provisions in statutes or regulations that would require amendment to establish the exemption, and an explanation of why such an exemption would not frustrate the overall intent of the Act.

All persons desiring to comment on DDOE's proposed regulations should file comments in writing not later than (30) days after the publication of this notice in the *D.C. Register*. Comments should be labeled "Review of the Retail Establishment Carryout Bag Regulations" and filed with the District Department of the Environment, Water Quality Division, 51 N Street, N. E., 6th Floor, (if filed before February 19, 2010) or 1200 1st Street, 7th Floor (if filed after February 19, 2010), Washington D.C. 20002, Attention: MaryLynn Wilhere, or by e-mail to marylynn.wilhere@dc.gov.

Title 21 DCMR is amended by adding a new Chapter 10, entitled Retail Establishment Carryout Bags, to read as follows:

CHAPTER 10: RETAIL ESTABLISHMENT CARRYOUT BAGS

1000 PURPOSE

The purpose of this chapter is to implement the provisions of the Anacostia River Clean Up and Protection Act of 2009, effective September 23, 2009 (D.C. Law 18-55; D.C. Official Code § 2-1226.51 *et seq.*).

1001 DISPOSABLE CARRYOUT BAG FEE REQUIREMENT

1001.1 Except as provided in Section 1006, a retail establishment shall charge each customer making a purchase from the establishment a fee of five cents ($0.05) for each disposable carryout bag provided to the customer with the purchase.

1001.2 The fee imposed by Section 1001.1 shall be charged to a customer making a purchase whether the purchase is in person, through the internet, by telephone, by facsimile, electronically, or by any other means.

1001.3 The retail establishment shall indicate on the customer transaction receipt the number of disposable carryout bags provided, and the total amount of the fee charged.

1002 DISPOSABLE CARRYOUT BAG MATERIAL AND LABELING REQUIREMENTS

1002.1 Starting on April 1, 2010, each disposable carryout bag provided by a retail establishment shall meet the following requirements:

(a) All paper and plastic disposable carryout bags provided shall be one hundred percent (100%) recyclable;

(b) All paper and plastic disposable carryout bags shall display in a highly visible manner the phrase "Please Recycle This Bag", or a substantially similar phrase. The lettering of the phrase shall meet the following requirements:

(1) The lettering of the phrase shall be at least one half of an inch (0.5″) in height or at least seventy-five percent (75%) of the width of the front panel of the bag;

(2) The lettering of the recycling statement shall appear on the exterior of either the front or back panel of the bag, and not on a gusset or the base of the bag; and

(3) The lettering of the recycling statement shall be in a boldface font.

(c) A disposable carryout bag made of paper shall contain a minimum of forty percent (40%) post-consumer recycled content; and

(d) A disposable carryout bag made of plastic shall be made of high-density polyethylene film marked with the SPI resin identification code 2, or low-density polyethylene film marked with the SPI resin identification code 4.

1002.2 A disposable carryout bag shall meet the requirements of this section, even if the bag is biodegradable or compostable.

1002.3 A disposable carryout bag made of both plastic and paper shall meet the paper carryout bag requirements of this section for the paper components of the bag, and shall meet the plastic carryout requirements of this section for the plastic components of the bag.

1003 RETAIL ESTABLISHMENTS SUBJECT TO CARRYOUT BAG REQUIREMENTS

1003.1 For the purposes of this chapter, the term “retail establishment” means:

(a) Any business required to have a Public Health: Food Establishment Retail endorsement to a basic business license pursuant to D.C. Official Code § 47-2827; and

(b) Any business required to have an off-premises retailer’s license, class A or B, pursuant to D.C. Official Code § 25-112.

1003.2 Such retail establishments include, but are not limited to, the following types of business:

(a) Bakeries;

(b) Delicatessens;

(c) Grocery stores;

(d) Convenience stores that sell food;

(e) Restaurants (subject to the exception set forth in section 1006);

(f) Food vendors;

(g) Street vendors that sell food;

(h) Liquor stores; and

(i) Any business that sells food items, whether or not the principal purpose of the business is to sell food items, including a department store or electronics store that has a Public Health: Food Establishment Retail endorsement to its basic business license.

1004 APPLICATION OF CARRYOUT BAG REQUIREMENTS TO RETAIL ESTABLISHMENTS SELLING BOTH FOOD AND NON-FOOD ITEMS

1004.1 The disposable carryout bag fee, and material and labeling requirements of this chapter, shall apply to a disposable carryout bag provided with the purchase of any item from by a retail establishment subject to this chapter, even if the item is a non-food item.

1005 APPLICATION OF CARRYOUT BAG REQUIREMENTS TO RESTAURANTS

1005.1 A restaurant with seating, as described in D.C. Official Code § 47-2827(e)(2), shall comply with the fee, and material and labeling requirements of Sections 1001 and 1002, for each of the following disposable carryout bags provided to a customer to take food away from the restaurant:

(a) A plastic carryout bag;

(b) A paper carryout bag, if:

(1) The bag includes a non-food item, whether or not the bag also contains a food item; and

(2) The restaurant directly charges the customer for the non-food item.

1005.2 A retail establishment where food is prepared and sold only for consumption off the premises, such as a delicatessen without seating or a carry-out establishment, that does not qualify as a restaurant under D.C. Official Code § 47-2827(e)(2), shall comply with the fee, and material and labeling requirements of Sections 1001 and 1002, for all paper and plastic disposable carryout bags provided to a customer with his or her purchase.

1006 CARRYOUT BAGS NOT SUBJECT TO THIS CHAPTER

1006.1 For the purposes of this Chapter, the term "disposable carryout bag" shall not include:

(a) A bag used by a customer inside stores to package bulk items, such as fruit, vegetables, nuts, grains, or candy;

(b) A bag used by a customer inside a store to contain or wrap frozen foods, meat, or fish, whether or not the items are prepackaged;

(c) A bag used by a customer inside a store to contain or wrap flowers, potted plants, or other items where dampness may be a problem;

(d) A bag used by a customer inside a store to contain unwrapped prepared foods or bakery goods;

(e) A bag used by a customer by a pharmacist to contain prescription drugs;

(f) A newspaper bag, door-hanger bag, laundry-dry cleaning bag, or bags sold in a package intended for use as garbage, pet waste, or yard waste bags;

(g) A bag provided to a customer by the retail establishment for the purpose of transporting a partially consumed bottle of wine, as required by D.C. Official Code § 25-113(b)(5)(C);

(h) A paper carryout bag provided to a customer to take food away from a restaurant with seating, as described in D.C. Official Code § 47-2827(e)(2), if the bag contains only:

(1) Food items; or

(2) Food and non-food items that the restaurant does not directly charge the customer for; and

(i) A reusable carryout bag, as defined in Section 1099.

1007 RETENTION AND REMITTANCE OF THE CARRYOUT BAG FEE

1007.1 Except as provided in Section 1008, a retail establishment shall retain one cent ($0.01) of each fee of five cents ($0.05) charged pursuant to section 1001 and shall remit the remaining four cents ($0.04) of each fee of five cents ($0.05) charged pursuant to section 1001 to the Office of Tax and Revenue.

1008 CARRYOUT BAG CREDIT PROGRAM

1008.1 If a retail establishment participates in the voluntary Carryout Bag Credit Program, the establishment may retain an additional one cent ($0.01), for a total of two cents ($0.02), from each fee of five cents ($0.05) charged pursuant to Section 1001. The remaining three cents ($0.03) of each fee of five cents ($0.05) charged pursuant to Section 1001, shall be remitted to the Office of Tax and Revenue.

1008.2 The voluntary Carryout Bag Credit Program means a program under which the retail establishment:

(a) Credits the customer at least five cents ($0.05) for each carryout bag provided by the customer for packaging his or her purchases, regardless of whether the bag is paper, plastic, or reusable;

(b) Prominently advertises its participation in, and the substance of, the Carryout Bag Credit Program at each of its checkout registers;

(c) Reflects the total credit amount on the receipt of the customer who provides his or her own bag or bags; and

(d) Registers its participation in the Carryout Bag Credit Program with the District Department of the Environment.

1008.3 A retail establishment shall not be required, as a prerequisite to participating in the Carryout Bag Credit Program, to provide a credit to a customer for any portion of the customer's purchase for which the customer declines the use of a carryout bag.

1008.4 The retail establishment shall credit a customer a total number of five cent ($0.05) credits that reasonably relate the amount of goods purchased to the number of carryout bags reasonably required to carry the purchased goods.

1008.5 A credit provided to a customer pursuant to a Carryout Bag Credit Program shall not reduce the amount of fees due to the Office of Tax and Revenue under Sections 1007.1 and 1008.1.

1008.6 A retail establishment that withdraws from the Carryout Bag Credit Program shall provide notice to the District Department of the Environment of its withdrawal at least ten (10) business days before its withdrawal.

1009 TAX STATUS OF FEES RETAINED BY RETAIL ESTABLISHMENT

1009.1 The fees retained by a retail establishment under this Chapter shall not be classified as revenue and shall be tax-exempt for the purposes of Chapters 18, 20, and 27B of Title 47 of the District of Columbia Official Code.

1009.2 The fees retained by the retail establishment under this section shall be excluded from the definition of a retail sale under D.C. Official Code § 47-2001(n)(2) and from the definition of gross receipts under D.C. Official Code § 47-2761(5).

1009.3 The fees to be remitted to the District under Sections 1007.1 and 1008.1 shall be added to other tax payments in determining whether the electronic payment requirement under D.C. Official Code § 47-4402(c) applies.

1010 PROHIBITION ON CERTAIN FEE-RELATED PRACTICES

1010.1 A retail establishment shall not assume or absorb, or refund to the customer, the disposable carryout bag fee.

1010.2 A retail establishment shall not advertise or hold out or state to the public or to a customer, directly or indirectly, that the reimbursement of the disposable carryout bag fee or any part of the fee to be collected by the retail establishment will be assumed or absorbed by the retail establishment or refunded to the customer.

1011 PROHIBITION ON SALE AND DISTRIBUTION OF CERTAIN DISPOSABLE CARRYOUT BAGS

1011.1 Disposable carryout bags made of plastic that is not one hundred percent (100%) recyclable shall not be sold or distributed, retail or wholesale, in the District.

1011.2 The prohibition set forth in this section applies to all disposable carryout bags sold or distributed, retail or wholesale, to or by any establishment in the District, whether or not the establishment is a retail establishment.

1012 PENALTIES FOR VIOLATIONS

1012.1 Violation of any of the requirements of this chapter, except for Sections 1007, 1008.1, 1008.5, and 1009, shall subject a retail establishment to the penalties set forth in this Chapter.

1012.2 If the Director of the District Department of the Environment ("Director") determines that a violation of this chapter covered by subsection 1012.1 has occurred, the Director shall issue a warning notice to the retail establishment for the initial violation.

1012.3 If the Director determines that an additional violation of this chapter has occurred after a warning notice has been issued for an initial violation, the Director shall issue a notice of infraction and shall impose a penalty against the retail establishment.

1012.4 The penalty imposed by the Director shall not exceed the following, for each violation that occurs after the issuance of the warning notice:

(a) One hundred dollars ($100) for the first violation in a calendar year;

(b) Two hundred dollars ($200) for the second violation in a calendar year; and

(c) Five hundred dollars ($500) for the third and each subsequent violation in a calendar year.

1012.5 No more than one (1) penalty shall be imposed upon a retail establishment within a seven (7) calendar day period.

1012.6 A retail establishment shall have fifteen (15) calendar days after the date that a notice of infraction is issued to pay the penalty.

1012.7 The penalty shall double after fifteen (15) calendars days if the retail establishment:

(a) Does not pay the penalty; or

(b) Fails to respond to a notice of infraction by either denying or objecting in writing to the infraction or penalty.

1012.8 A recipient may request a hearing pursuant to instructions contained in the notice of infraction.

1012.9 Hearings or adjudications of violations under this Chapter shall be conducted pursuant to the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code §§ 2-1831.01 *et seq.*).

1099 DEFINITIONS

When used in this Chapter, the following words and phrases shall have the meanings ascribed:

100 percent (100%) recyclable - capable of being collected, separated, and recovered from the solid waste stream through the District's recycling programs, and either used again or reused in the manufacture or assembly of another package or product.

Act - means the Anacostia River Clean Up and Protection Act of 2009, effective September 23, 2009 (D.C. Law 18- 0055; D.C. Official Code § 2-1226.51 *et seq*.).

Disposable carryout bag - a bag of any material, commonly plastic or kraft paper, which is provided to a customer at the point of sale to carry purchases.

Post-consumer recycled content - any material that has completed its use as a consumer item and that would otherwise have been disposed of as municipal solid waste, but that has instead been reused or reconstituted as a product or raw material.

Reusable carryout bag - a bag with handles that is specifically designed and manufactured for multiple reuse and is made of cloth, fiber, other machine-washable fabric, or durable plastic that is at least two and one-quarter millimeters (2.25 mm) thick.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PROPOSED RULEMAKING
Z.C. Case No. 09-13
(Text Amendment – 11 DCMR)
BZA Expedited Review Process

The Zoning Commission for the District of Columbia, pursuant to its authority under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799, D.C. Official Code § 6-641.07), hereby gives notice of its intent to amend the Board of Zoning Adjustment Rules of Practice and Procedure, Chapter 31 of DCMR Title 11. The Commission proposes to amend § 3113 and add a new § 3118 to allow the Board of Zoning Adjustment to decide certain types of applications without a hearing, if the applicant waives that right, and if certain persons or entities do not object.

Final rulemaking action shall be taken in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

The proposed amendments are as follows:

DCMR Title 11, ZONING, Chapter 31, BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE, is amended as follows:

1. Section 3113, PRE-HEARING PROCEDURES FOR APPLICATIONS, § 3113.1 is amended by inserting the phrase "and to applications processed under the expedited review procedures to the extent specified in § 3118", so that the subsection will read as follows.

   3113.1 The rules of procedure in this section apply to all applications filed with the Board (including applications filed pursuant to §§ 3107 and 3108 in effect prior to October 1, 1999, and §§ 3103 and 3104); provided, however, the provisions of this section only apply to chancery applications to the extent specified in § 3134 and to applications processed under the expedited review procedures to the extent specified in § 3118.

2. A new section 3118, EXPEDITED REVIEW, is added to read as follows:

   3118 EXPEDITED REVIEW

   3118.1 The purpose of this section is to create an expedited review process to be followed after an applicant waives their right to a hearing for an eligible application.

   3118.2 An eligible application is an application for:

      (a) An addition to one-family dwelling or flat or new or enlarged accessory structures pursuant to § 223; or

(b) A park, playground, swimming pool, or athletic field pursuant to § 209.1.

3118.3 Subject to the removal process described in §§ 3118.6 and 3118.7, an eligible application that includes a waiver of hearing will be placed on an expedited review calendar and decided without hearing at the Board's next regularly scheduled session after:

(a) The completion of the public notice procedures set forth in § 3118.4; and

(b) The completion of the ANC review period of thirty (30) days from the date it receives notice of the application, excluding Saturdays, Sundays, and holidays, plus an additional fourteen (14) calendar days.

3118.4 Notice of expedited review shall be given in the same manner and include the same information as required by §§ 3113.12 through 3113.16, except that references to "public hearing" or "hearing" shall mean "expedited review" and all other requirements of § 3113 shall apply with the same proviso.

3118.5 The public notice of an expedited review and the ANC notice of an application requesting expedited review shall also indicate:

(a) The procedure for requesting the removal of the application from the expedited review calendar as described §§ 3118.6 and 3118.7; and

(b) That the only public notice of the hearing date for a removed application will be the posting of that date in the Office of Zoning beginning on the date that the application was removed and continuing until the date of such hearing.

3118.6 An application tentatively placed on an expedited review calendar will be removed and rescheduled for a hearing:

(a) At the oral or written request of a Boardmember made at any time prior to the vote on the application;

(b) Upon the receipt of a timely filed request for party status in opposition to the application; or

(c) At the written request of the following persons or entities, if filed with the Office of Zoning no later than fourteen (14) days prior to the date that the expedited review is scheduled:

(1) The Office of Planning;

(2) The affected ANC(s) or affected Single Member District(s);

(3) The Councilmember representing the area in which the subject property is located or representing an area located within two-hundred feet (200 ft.) of the subject property; or

(4) The owner or occupant of any property located within two-hundred feet (200 ft.) of the subject property.

3118.7 A request to remove made pursuant to § 3118.6 (c) (2) through (4) shall be accompanied by statement indicating that the requester, or the requester's representative, intends to appear as a witness at the hearing and shall also include a summary of the testimony to be given at that time.

3118.8 The Chair may deny a request to remove an application if the proffered testimony is irrelevant.

3118.9 Orders granting an application approved by expedited review need not contain findings of facts or conclusions of law, but shall reflect the nature of the relief granted and any conditions imposed.

All persons desiring to comment on the subject matter of this proposed rulemaking action should file comments in writing no later than thirty (30) days after the date of publication of this notice in the D.C. Register. Comments should be filed with Sharon Schellin, Secretary to the Zoning Commission, Office of Zoning, 441 4th Street, N.W., Suite 200/210-S, Washington, D.C. 20001. Copies of this proposed rulemaking action may be obtained at cost by writing to the above address.